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IN THE
COURT OF APPEALS OF INDIANA

MARIETTA HINKEL,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0603-CV-107
	)	
HOME DEPOT USA, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0209-CT-204

May 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Marietta Hinkel appeals the judgment in her personal injury claim against Home Depot USA, Inc. Hinkel raises four issues, which we revise and restate as:

I. Whether the trial court erred by limiting the testimony of Hinkel's expert witness;

II. Whether the trial court erred by denying Hinkel's motions for judgment on the evidence regarding comparative fault, liability, and mitigation of financial damages; and

III. Whether the evidence is sufficient to support the jury's verdict.

We affirm.[1]

The relevant facts follow. On March 29, 2001, Hinkel, who worked as a massage therapist, went to Home Depot to buy ceiling grids for her office. The ceiling grids on the shelf were damaged so she asked a Home Depot employee, Richard Gething, to assist her. Gething told Hinkel that he needed to get the ceiling grids off a higher shelf and returned with a ladder. At this point, Hinkel was standing across the aisle. Gething attempted to get the box containing the ceiling grids, which was located on a shelf above Hinkel's head. Gething pulled, tugged, pushed, shoved, and wiggled the box to bring it closer to him. Hinkel asked Gething why he did not get help because he was struggling with the box. Gething told Hinkel that there was nobody else and that Hinkel had to be

[1] We remind Hinkel and Home Depot that Ind. Appellate Rule 46(A)(8) states that each contention in the argument section "must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."

patient. Gething asked Hinkel if one end of the box was open, and Hinkel walked to the side of the box. A cylindrical container of metal rods was located next to the shelves.

Hinkel went to look and she saw Gething look "like he was going to flip himself because he really shoved it." Transcript at 700. Hinkel reached up to help steady the box and stepped over the cylindrical container. The cylindrical container fell towards Hinkel, and Hinkel grabbed the container of the metal rods with her hand and tried to jump. Hinkel tried to get out from underneath it as the container fell. Hinkel felt "needles shooting out of [her] hand." Id. at 700. Hinkel suffered an "impingement syndrome, with AC joint arthrosis and a sternoclavicular strain," and a brachial plexus injury. Id. at 431.

In September 2003, Hinkel filed a complaint against Home Depot alleging that she sustained injuries due to Home Depot's negligence, carelessness, and recklessness. On October 28, 2005, the trial court held a discovery hearing.[2] On November 10, 2005, the trial court entered an order from the October 28, 2005, hearing that stated that Home Depot was "permitted to retain and use a financial expert regarding [Hinkel]'s lost profits, lost wages and/or earning capacity at trial," and that Hinkel was "permitted to obtain a financial expert." Appellant's Appendix at 19. The order also stated that "[t]he report of [Hinkel]'s financial expert is due by November 18, 2005. The deposition of [Hinkel]'s financial expert is due before the trial." Id. On November 23, 2005, Home

[2] A transcript of this hearing is not included in the record on appeal.

Depot filed a motion to strike Hinkel's expert, Thomas Grzesik, a rehabilitation counselor, because Grzesik was not an economist, Grzesik was not a rebuttal witness, and Grzesik's opinion regarding Hinkel's ability to obtain employment had not been disclosed during the course of discovery.

At trial, Hinkel called James Bernard, an economist and Home Depot's expert witness. Bernard testified that based on the medical opinions Hinkel could perform light clerical work and that such work pays "in the $7.00 to $10.00 an hour range." Transcript at 270. Bernard also testified that if Hinkel worked forty hours a week making $8.00 an hour plus benefits of $2.00 an hour she would have mitigated earnings of $185,000.

Hinkel also called Grzesik, a rehabilitation counselor. The trial court addressed Home Depot's motion to strike Grzesik as a witness and did not strike Grzesik as a witness but stated that Grzesik "may only address those issues that were raised by Dr. Bernard. The amount of wages, clearly, he's permitted to testify as to the amount of income that a massage therapist could earn in the State of Indiana and perhaps other questions." Id. at 479. The trial court also told Hinkel that she "had ample opportunity to name a vocational expert within the time limits set forth in the Orders entered by this Court throughout the history of this case. And I can't permit you to change or to add a new area at this late hour." Id. at 481-482.

Home Depot introduced Hinkel's medical records, and Hinkel objected to some of the records on the basis of "foundation" and "hearsay." Id. at 746. Home Depot stated that the medical records were being offered to impeach Hinkel. The trial court sustained

the objection "as to the admissibility of the documents themselves" but allowed Home Depot to question Hinkel about statements she made on a prior occasion as set forth in the medical records. Id. at 750. The medical records were later admitted into evidence.

At the close of the evidence, Hinkel moved for a judgment on the evidence on the issues of liability, comparative fault, and mitigation of economic damages, which the trial court denied. The jury found that Hinkel's damages were $600,000 and assessed fifty-one percent of the fault to Home Depot and forty-nine percent of the fault to Hinkel. Hinkel filed a motion to correct error, which the trial court denied.[3]

I.

The first issue is whether the trial court erred by limiting the expert testimony of Thomas Grzesik. We initially address whether the trial court's limitation on Grzesik's testimony was a discovery sanction. Hinkel does not argue that the trial court erred by imposing a discovery sanction. Rather, Hinkel argues that "the trial court did not limit Grzesik's testimony as a discovery sanction" and "[i]nstead, the trial court clearly stated during the trial that he would not permit Grzesik's testimony to impeach her physician's opinions on Hinkel's functional abilities." Appellant's Brief at 13.

At trial, the trial court addressed Home Depot's motion to strike Grzesik as a witness. Home Depot argued that Grzesik had never been disclosed as a vocational expert during the course of discovery. The trial court did not strike Grzesik as a witness

[3] A copy of the motion to correct error is not included in the record.

but stated that Grzesik "may only address those issues that were raised by Dr. Bernard. The amount of wages, clearly, he's permitted to testify as to the amount of income that a massage therapist could earn in the State of Indiana and perhaps other questions." Transcript at 479. Hinkel argued that Grzesik's testimony would rebut Dr. Bernard's testimony and that "the only issues [sic] I believe that we intend to make is whether [Hinkel]'s employable or not employable as a mitigating damages." Id. at 481. The trial court stated:

> Well, here's the problem that I have . . . . This information was available to both sides. You had ample opportunity to name a vocational expert within the time limits set forth in the Orders entered by this Court throughout the history of this case. And I can't permit you to change or to add a new area at this late hour.

Id. at 481-482. Based on the trial court's statement, we conclude that the trial court imposed a discovery sanction.

The appropriate sanctions for failure to comply with a trial court's order concerning discovery is a matter committed to the sound discretion of the trial court. McCullough v. Archbold Ladder Co., 605 N.E.2d 175, 180 (Ind. 1993); Ind. Trial Rule 37. "Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each case." McCullough, 605 N.E.2d at 180. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. Id. Exclusion of the testimony from an undisclosed witness is one of the sanctions available under Trial Rule 37(B)(2). Id.

On appeal, Hinkel argues that "Grzesik's testimony most certainly would not have contradicted the medical testimony. In fact, Grzesik's testimony, as a *vocational expert*, would have corroborated and confirmed the medical testimony that Hinkel needed vocational rehabilitation to find employment she could do with her limitations." Appellant's Brief at 22 (emphasis added). The trial court told Hinkel that she "had ample opportunity to name a *vocational expert* within the time limits set forth in the Orders entered by this Court throughout the history of this case. And I can't permit you to change or to add a new area at this late hour." Transcript at 481-482 (emphasis added). Hinkel does not argue that the discovery order was an abuse of discretion or that the trial court abused its discretion by imposing a discovery sanction. Accordingly, we cannot say that the trial court abused its discretion by limiting Grzesik's testimony as a discovery sanction.

II.

The next issue is whether the trial court erred by denying Hinkel's motions for judgment on the evidence. Specifically, Hinkel argues that the trial court erred by denying her motion for judgment on the evidence regarding comparative fault, liability, and mitigation of financial damages. The standard of review for a challenge to a ruling on a motion for judgment on the evidence is the same as the standard governing the trial court in making its decision. Kirchoff v. Selby, 703 N.E.2d 644, 648 (Ind. 1998). A motion for judgment on the evidence is governed by Ind. Trial Rule 50(A), which provides:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

Judgment on the evidence is proper when there is an absence of evidence or reasonable inferences in favor of the nonmoving party and the evidence must support without conflict only one inference which is in favor of the moving party. Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1051 (Ind. 2003). The court looks only to the evidence and the reasonable inferences drawn most favorable to the nonmoving party, and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case. Kirchoff, 703 N.E.2d at 648.

A. Liability & Comparative Fault

Hinkel argues that she was entitled to judgment on the evidence because the evidence showed that Home Depot was solely responsible for Hinkel's injuries.[4] Home Depot argues that "[t]here was conflicting evidence of whether she handled the box of ceiling grids, and there was conflicting evidence of whether she stepped on or stumbled over the tube of ceiling ties before it fell on her." Appellee's Brief at 11-12. Home Depot references Hinkel's "varying versions of the incident, from the Incident Witness

[4] Hinkel concedes that she "acknowledged to the trial court that her argument on the issue of comparative fault would be exactly the same" as her argument on the issue of liability. Appellant's Brief at 19.

Statement, to the medical records which indicated that she told her physicians how the incident occurred." Id. at 12.

Hinkel objected to some of the medical records and now argues that these medical records "are not substantive evidence since Home Depot introduced them for impeachment purposes only." Appellant's Reply Brief at 10. However, Hinkel does not contend and our review of the record does not reveal that Hinkel requested an admonishment of the jury. Thus, we may consider the medical records. See Ind. Evidence Rule 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly"); see also Small v. State, 736 N.E.2d 742, 746 (Ind. 2000) (holding that "if a defendant believes there is a danger that a jury could use a statement as substantive evidence, then it is incumbent upon the defendant to request that the jury be admonished that the statement be used to judge the witness's credibility only" and that the defendant waived any claim of error based on the trial court's failure to admonish the jury).

The record reveals that Gething filled out an accident report that stated that "concrete tubing full of ceiling tie wire fell" and Hinkel "tried to hold it up, thus falling on [her] arm and leg." Transcript at 340. Hinkel's incident witness statement, which was introduced and admitted without objection, stated, "gentleman moving ceiling grid – went to help balance it was off balance – a box of wire started to fall – my left leg was

under it I tried to hold and push it off my leg – my [right] upper arm – [left] forearm [left] back [left] foot." Defendant's Exhibit L.

Dr. Nicole Einhorn stated in her "SECOND OPINION CONSULTATION," which was admitted without objection:

> [Hinkel] was assisting a Home Depot employee retrieve an article from a high shelf. The employee was on a ladder and she was standing below. The open box started to fall from the shelf. She stepped forward to help steady it when a heavy bin containing metal rods on the floor next to her started to fall against her left leg.

Defendant's Exhibit JJ at 380. Hinkel had a functional capacity evaluation, which states:

> Ms. Hinkel is a 49 y/o female with dx'd Brachial plexopathy/right shoulder pain after sustaining a [sic] an injury while holding a long box of ceiling tile frames at Home Depot on March 29, 2001; states that was she [sic] trying to hold the falling box to keep from being pushed to the ground (supporting the box below waist level) and at the same time attempting to maintaining [sic] her balance when she felt a sharp pain in her right shoulder.

Defendant's Exhibit JJ at 460. Dr. Keith Pitchford's history of Hinkel's illness states:

> She was getting help from one of the employees who had brought a ladder standard over to get the boxes down when one of the boxes had swung out in a boom fashion and the patient states that she reached up to help steady it as the box was open and she was worried that a piece would fall out. It was shifted to another box and swung out in a boom fashion. She reached up to help the employee and stepped over a bucket of ceiling ties that was positioned nearby in a circular concrete form. She states that it was very heavy and it landed against her left anterior thigh pulling. She was struggling to pull the box back because it was falling against her knocking her over. She felt a pull in her right arm with a burning sensation to her right shoulder and down her arm.

Defendant's Exhibit JJ at 469. In a letter from Dr. Mary Doyle to Dr. Pitchford, Dr. Doyle informed Dr. Pitchford of her chiropractic assessment of Hinkel. Dr. Doyle wrote:

> [Hinkel] was at Home Depot Store on March 29, 2001 whereupon she sustained an injury. To assist a store employee was standing on a large ladder apparatus trying to pull a 12 foot box off of an overhead shelf, [Hinkel] reached up with her right hand to balance the wavering box and then felt a heavy object contacting her left leg, pushing her over toward the right. [Hinkel] pulled her right arm down to try and stop a large heavy cylinder of metal rods from pushing her over. She proceeded to fall as a result and felt a hot, searing, tearing pain along her posterolateral cervical spine . . . .

Defendant's Exhibit JJ at 4.

Based on the foregoing evidence, we conclude that Home Depot presented evidence that disputed Hinkel's contention that she did not touch the display before it fell on her. Under the circumstances, we cannot say that the evidence presented regarding liability is without conflict and subject to only one inference that is favorable to Hinkel. See City of Crawfordsville v. Price, 778 N.E.2d 459, 463 (Ind. Ct. App. 2002) (holding that "we cannot say that a factfinder could come to only one logical conclusion on the apportionment of fault"). Thus, the trial court did not err by denying Hinkel's motion for judgment on the evidence on the issue of liability and comparative fault. See, e.g., Consolidated Rail Corp. v. Thomas, 463 N.E.2d 315, 322 (Ind. Ct. App. 1984) (holding that trial court properly denied a motion for a directed verdict).

B. Mitigation of Damages

The next issue is whether the trial court erred by denying Hinkel's motion for judgment on the evidence regarding mitigation of financial damages. Hinkel argued that she was entitled to a judgment on the evidence because she sought work through vocational rehab and went back to school. The trial court stated:

> [O]n the economic side, you don't need expert opinion on that. That is something that's within the common experience of the jury. [Hinkel] was vigorously cross examined with respect to her activities regarding looking for employment, the economics of her massage business and the like, as well as other things. And I think that from that the jury could reasonably conclude that she did not mitigate her damages on the economic side.

Transcript at 925.

"[A] plaintiff in a negligence action has a duty to mitigate his or her post-injury damages, and the amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented." Willis v. Westerfield, 839 N.E.2d 1179, 1187 (Ind. 2006). The defendant bears the burden to prove that the plaintiff has not used reasonable diligence to mitigate damages. Id.

Dr. Einhorn and Dr. Gregori testified regarding Hinkel's ability to work. Specifically, the following exchange occurred during the direct examination of Dr. Einhorn:

> Q In your opinion, as a doctor, would she be able to use her right arm in any kind of manual, physical labor in the future?
>
> A Again, there's a difference between manual and physical. She will not be able to do heavy labor, I don't think. She can't do repetitive shoulder motion. I don't think she can do overhead work for any period of time. I don't think she can do things that require, you know, lifting.
>
> From that sense, you know, her shoulder function is a lot more limited. You know, could she do clerical work and things where she's working down below and using just her hands. That's a more appropriate thing. So, in that sense, again, she needed vocational rehab. She needed to find a way of functioning and earning a living which doesn't put that kind of stress on her shoulder. It doesn't rely so much on shoulder motion and strength.

Transcript at 455. Dr. Gregori testified that Hinkel "could do a desk job or something light duty where she's not lifting regularly, but it would be pretty restricted." Id. at 595. Bernard testified that light clerical work pays "in the $7.00 to $10.00 an hour range," and that if Hinkel worked forty hours a week making $8.00 an hour plus benefits of $2.00 an hour she would have mitigated earnings of $185,000. Id. at 270. Hinkel testified that, aside from her vocational counseling and her decision to go to school, she had not applied for a job.

We cannot say that the evidence presented regarding mitigation of financial damages is without conflict and subject to only one inference that is favorable to Hinkel. Thus, the trial court did not err by denying Hinkel's motion for judgment on the evidence regarding mitigation of financial damages.

III.

The next issue is whether the evidence is sufficient to support the jury's verdict. Hinkel argues that "[t]here is no evidence that Hinkel was at fault and Home Depot failed to present evidence to the contrary." Appellant's Brief at 12. Hinkel also argues that Home Depot "presented no evidence to dispute the fact that Hinkel did not touch, hit or bump the display before it fell on her." Id. at 14.

We have previously concluded that Home Depot presented evidence that disputed Hinkel's contention that she did not touch the display before it fell on her. See supra Issue II. "Fault apportionment under the Indiana Comparative Fault Act is uniquely a question of fact to be decided by the jury." McKinney v. Pub. Serv. Co. of Ind., Inc., 597

N.E.2d 1001, 1008 (Ind. Ct. App. 1992), trans. denied. "[A]t some point the apportionment of fault may become a question of law for the court. But that point is reached only when there is no dispute in the evidence and the factfinder is able to come to only one logical conclusion." Robbins v. McCarthy, 581 N.E.2d 929, 934 (Ind. Ct. App. 1991), reh'g denied, trans. denied. Because we have concluded that there is a dispute in the evidence, the apportionment of fault should be left for the jury.[5] See, e.g., City of Crawfordsville, 778 N.E.2d at 463 (holding that the apportionment of fault should be left to the factfinder because different inferences could be drawn from the facts); Robbins, 581 N.E.2d at 934-935 (holding that the apportionment of fault should be left for the jury).

For the foregoing reasons, we affirm the judgment.

Affirmed.

MAY, J. and BAILEY, J. concur

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[5] Hinkel also argues that the trial court erred when it denied her motion for judgment notwithstanding the verdict and also mentions the trial court's denial of her motion to correct error. Hinkel fails to cite to the record to support her argument that she made a motion for judgment notwithstanding the verdict. Additionally, we note that Ind. Trial Rule 50(E) abolished motions for judgment notwithstanding a verdict. Thus, we presume that Hinkel argues that she was entitled to judgment on the evidence under Ind. Trial Rule 50(A), and we have addressed that argument above. See Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 765 (Ind. Ct. App. 2005) (holding that "[a]s Ind. Trial Rule 50(E) abolished motions for judgment notwithstanding a verdict, we presume that [appellants] are arguing they were entitled to judgment on the evidence under Ind. Trial Rule 50(A)"), trans. denied. Hinkel also mentions a motion to correct error but only cites to the chronological case summary and does not include a copy of the motion to correct error. Nonetheless, Hinkel's argument is that the trial court should have set aside the jury finding of comparative fault and awarded Hinkel the entire judgment because "[t]he evidence presented in this case shows a complete failure of proof that Hinkel was 49% at fault." Appellant's Brief at 20. We have already addressed these arguments. See supra Issue II.